IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.765 OF 1998.

Mrs.Silvie J. Meyers
since deceased through LRs,
1(a) Miss Ballerina Meyers & ors. : Appellants.
versus
Mr.Edward J. D'Souza
since deceased
Mrs. Jeneatte Wd/o Edward
D'Souza & ors. : Respondents.

Mr.S.Reis with Mr.O.S.Pareira for the appellants.
Ms.Geeta Menon for Respondent Nos. 2 and 4.
None for other respondents.

CORAM : D.G.DESHPANDE,J.

DATED : 14th February 2005.

ORAL ORDER

1. Heard Mr.Reis for the appellants and, Ms. Geeta Menon for Respondent Nos. 2 and 4, who is supporting the appellants. Nobody is present for

the other respondents.

2. The appellant, who was the original plaintiff, was filed a suit in the City Civil Court for partition and separate possession of the property, which is described in Annexure-A of the plaint, against the respondents, who were the legal representatives of common ancestor. Respondent No.5 is the purchaser of one of the joint properties. The parties are Christian. The trial Court dismissed the suit in its entirety and hence this appeal.

3. Counsel for the appellants fairly conceded that though the Annexure-A of the plaint covers number of properties, he will strict his appeal only to the properties named as "Josrose" wherein the plaintiff has claimed his 1/3rd share and another property "Joseph Mansion" situated in Malad (W). There also the plaintiff has claimed 1/3rd share. He contended that the trial Court has, in fact, come to the conclusion that these properties are joint properties, but has refused to grant any decree. He drew my attention to para 33 of the judgment of the trial Court wherein the statement of the advocate for the

contesting defendant No.1 is recorded as under :-

> "On the contrary, the Learned Advocate for the defendant No.1 has magnanimously made statement before the Court on 5-12-97 which is recorded on page 48 of the notes of evidence to the effect that and quote :- " (At this stage after discussion with all the Advocates the Ld. Advocate for the Defendant No.1 Mr.Nagvenkar concedes that so far as Jose Rose property is concerned, all the children of Joseph and Rose have right_____)".

Considering the aforesaid statement of the defendant No.1's advocate, the counsel for the appellant, supporting by respondent Nos. 2 and 4, contended that a decree of partition in respect of this property Jose Rose, which is mentioned at (B)(1) in Annexure-A, should have been passed.

. Similarly, so far as other property i.e. Joseph Mansion is concerned, he contended that in respect of this property an agreement for sale

entered into between the defendant No.1 and defendant No.5. That agreement is reproduced in para 52 of the judgment which is as under :-

> "CLAUSES ON PAGE 3 UN-NUMBERED OF AGREEMENT FOR SALE DT. 18-1-1980 AT EX.15.
>
> AND WHEREAS in the meantime, a suit has been filed in the City Civil Court at Bombay, by his sister viz. Silvie F. Mayers against the Vendor and the wife Rita Velgin son and daughter Audry wife of Savy Miranda respectively of the Vendor's brother Arthur D'Souza in the City Civil Court at Bombay being Suit No.6519 of 1978 which is pending.
>
> "AND WHEREAS the notice of motion taken out by the plaintiff in the said suit has been dismissed;
>
> "AND WHEREAS no appeal has been preferred by the said plaintiff against the said dismissal of the notice of motion."

It appears form the agreement that the parties were aware of the pending of suit before the City Civil Court for partition. In spite of that the appellant and other respondents were not joined in the said agreement. But when defendant No.5 filed suit for specific performance, the consent terms came to be arrived at between the original defendant No.1 and the defendant No.5 excluding of other owners in the property and, the Court refused to pass any decree for partition on the ground that he could not sit in appeal over the consent decree. My attention was drawn by the counsel for the appellant to the order of Justice H. Suresh passed on 2.2.1990 in Suit No.6519 of 1978 i.e. the very suit from which the appeal is filed in the motion taken out by the appellant. It was in Appeal No.89 of 1990. In this order, according to the appellant, this Court has taken note of the pending suit and, therefore, following order was passed.

> No interference is called for at this stage, excepting that the Appellants will be at liberty to complete the construction work, if they so desire, at their own risk as to all costs and

> consequences. However, it is made clear that the Appellants will not be allowed to advance a plea that they have incurred expenses and invested large amounts in constructing this building, as an answer to the N/M. It is further made clear that as regards occupation of the tenements is concerned, the status-quo as per the commissioner's report will remain till the disposal of the N/M. Subject to the above, Appeal disposed off."

4. My attention was drawn by the advocate for the appellant to the Issue No.12 which is as under :-

> "Whether the original defendant No.1 proves that the rest of the properties were gifted to him under the duly registered Gift Deed dated 3rd February, 1961 executed by his father late Shri Joseph D'Souza in his favour as alleged in para (3) of his written Statement?

The finding on the aforesaid Issue No.12 is as under :-

> "The Original defendant No.1/ the present defendant No.1 has proved that except for 'Jose Rose Bungalow' and the 'Joseph Mansion' properties, the rest of the properties were gifted to him under the duly registered Gift Deed dt. 3rd February 1961 executed by his father late Shri.Joseph D'Souza in his favour as alleged in para (3) of his Written Statement."

5. Counsel for the appellant, therefore, contended that when Joseph Mansion is excluded from the Gift Deed along with Rose Bungalow then this finding clearly goes to show that both these properties were joint properties. Therefore, at the most, defendant No.1 could sell his share in the said property but any agreement between him and defendant No.5 could not cover the entire property i.e. Joseph Mansion and, that agreement could be only to the extent of share of defendant No.1. Therefore, even if the consent decree is passed, the purchaser would be entitled to the share of defendant No.1 in Joseph Mansion and, he will have to file suit against other owners in

the said property for partition and separate possession of the purchased share.

6. Since the appeal is now restricted to only these properties, it has to be seen that, whether the appellant is entitled to the declaration of as prayed in respect of these properties i.e. Joseph Mansion and Jose Rose Bungalow. The finding on Issue No.12 arrived at by trial Court clearly shows that both these properties were joint properties and, once the property is held to be joint, all those claiming share in it, as legal representatives of original owner, are entitled to as the decree for partition. Whether there is a consent decree as alleged between the defendant No.1 and defendant No.5 will not affect the right of other co-owenrs in the property. Therefore, the trial Court ought to have granted decree in favour of the plaintiffs at least in respect of these two properties. Therefore, to that extent appeal is required to be allowed. Hence I pass the following order :-

:ORDER:

The impugned judgment and decree of the trial Court dismissing the suit of the plaintiff for partition is set aside.

It is declared that the agreement for sale dated 19.9.1980 and the consent terms arrived at shall not be binding on those co-owners of the property who were not the parties to the said agreement i.e. the plaintiff and defendant Nos. 2, 3 and 4.

It is further declared that Respondent No.5 will get only the share of defendant No.1 in the property Joseph Mansion.

There shall be decree of partition of the properties Jos Rose and Joseph Mansion as prayed for by the plaintiff in respect of 1/4 or 1/3rd share i.e. each of the party will be entitled to 1/3rd share in the aforesaid two properties i.e. 1/3rd share for the plaintiff, 1/3rd share for defendant No.1 and 1/3rd share for Respondent Nos. 2, 3 and 4 together.

Accounts to be given by defendant No.1.

Defendant No.1 to bear the costs of the suit in the trial Court. But since he is absent here, no order as to costs, so far as appeal is concerned.

For partitioning the aforesaid houses, the trial Court will follow Order XXVI Rules 13 and 14 read with section 75 of the Code of Civil Procedure, and will place the plaintiffs and defendant Nos.2, 3 and 4 of their respective shares in Jose Rose and Joseph Mansion.

Certified copy expedited.

[D.G.DESHPANDE]

14/02/2005 JUDGE.